eliminated.[66] At a minimum, the Commission should adopt U S WEST's proposal to relieve the burden of duplicative ONA reporting on the part of individual BOCs by relying on NIIF reporting.[67] U S WEST also agrees with Community Internet Systems ("CIS") that ONA information should be made available on a Web page.[68] In its Comments, U S WEST recommended that BOCs be allowed to utilize technological developments, and supply information on diskette, through a Web page, by e-mail, or via other technologies.[69]

IV. THE COMMISSION SHOULD ADOPT REGULATORY CLASSIFICATIONS THAT REFLECT TECHNOLOGICAL DEVELOPMENTS AND DO NOT DISTORT MARKET BEHAVIOR

The majority of commenters agreed with U S WEST that there is no material difference between information services under the 1996 Act and the Commission's long-standing definition of enhanced services.[70] TRA, on the other hand, argues that voice messaging service, which has always been categorized as an enhanced service, nevertheless should be deemed a telecommunications service under the 1996 Act.[71] U S WEST believes there is no merit to TRA's argument and has presented its views in the context of TRA's pending Petition for Declaratory Ruling.[72]

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[66] Bell Atlantic at 20-21.

[67] U S WEST Comments at 52-54.

[68] CIS at 3.

[69] U S WEST Comments at 54.

[70] ITAA at 3-4; CompuServe at 12-15; Ameritech at 14-15.

[71] TRA at 9-10.

[72] Comments of U S WEST, Inc., CCB/CPD 98-16, filed Apr. 21, 1998 in response to TRA's Mar. 5, 1998 Petition for Declaratory Ruling.

Bell Atlantic suggested in its comments that the Commission, as part of harmonizing the definitions of information services and enhanced services, should now specify that an enhanced protocol conversion service is not offered by a carrier unless the form or content of the customer's information is modified by the carrier, and that a "net code or protocol conversion that is integral to a transmission service in which the content of a subscriber's information remains unchanged from end-to-end, and is not stored for later retrieval, is part of a telecommunications service."[73] Bell Atlantic points out that some protocol processing is inherent in the provision of all data services, and the fact that the communications protocols at both ends of a data communications service are in the same exact protocol is often a matter of happenstance, not deliberation. This is particularly the case with newer technologies, such as ATM (asynchronous transfer mode) which are deliberately designed to support more than one communications interface.

While many protocol conversions, even those which may result in supporting multiple interfaces between subscribers, can be offered in a data world because they are inherent in the provision of a data switched service (i.e., are used only for call set-up, call routing, call cessation, calling or called party identification, billing and accounting) or are part of transitioning to new technology,[74] there is still substantial confusion in this area which has the potential to disrupt even the simplest efforts by a BOC to improve its telecommunications offerings. Rather than leaving BOC

[73] Bell Atlantic at 19.

compliance in the area of protocol processing/enhanced services to chance, or the good or ill fortune of the affected BOC, the Commission should specify that the simple task of supporting more than one interface by a carrier is not an enhanced service. This salutary result can be accomplished by clarifying that such functions are adjunct to the service to which they are attached (i.e., basic or enhanced, depending on circumstances), as U S WEST has recommended, or by clarifying the definition, as Bell Atlantic has suggested. The end result is important and the clarification should be undertaken quickly.

V. CONCLUSION

The 1996 Act requires that the Commission use this proceeding to eliminate unnecessary ONA requirements and Computer III non-structural safeguards. Some commenters attempt to retain or resurrect regulations which serve their individual interests. Those commenters did not satisfy the heavy burden of proving that additional regulations are necessary or desirable. To the contrary, there is substantial evidence in the record of this proceeding that the information services market is thriving and under the Commission's non-structural regime. Moreover, the growth of local exchange competition under the 1996 Act alleviates any

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[74] In the Matters of Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 2 FCC Rcd. 3072, 3081-82 ¶¶ 64-71 (1987).

concerns about discrimination and supports further streamlining of the Commission's ONA requirements and non-structural safeguards.

Respectfully submitted,

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Its Attorneys

Of Counsel,
Dan L. Poole

April 23, 1998

ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Computer III Further Remand Proceedings:	)	CC Docket No. 95-20
Bell Operating Company Provision	)	
of Enhanced Services	)	

REPLY COMMENTS OF U S WEST, INC.

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SUMMARY

In this docket, the Commission is yet again revisiting the issue of structural separation for enhanced services provided by RBOCs. In U S WEST's initial comments, it was pointed out that the provision of integrated enhanced services by RBOCs pursuant to the non-structural safeguard rules had significantly benefited the public, the competitive marketplace for enhanced services, and, indeed, competitive enhanced service providers. It was also pointed out that structural separation was a seriously wasteful regulatory device which penalized efficiency and served to deprive the consuming public of beneficial services.

In their own initial comments, various parties seeking reimposition of structural separation argue long and hard that structural separation ought to be reimposed to prevent market disruptions caused by RBOC anticompetitive conduct in the offering of enhanced services. However, these parties were unable to come up with any evidence to support this proposition. In these reply comments, U S WEST points out several of the more egregious misstatements and overstatements made by these parties.

U S WEST first addresses several legal issues. We point out that U S WEST is entitled to structural relief as a matter of law, especially as the structural separation decisions were deliberately interim and transitional in nature. Contrary to the positions of the adverse parties, the Commission is not required to return this entire record to the Computer II (pre-1985) era. Instead, all the experience with U S WEST's offering of enhanced services is highly relevant to the docket.

Moreover, the order granting U S WEST structural relief is still in effect, and will be until and unless the Commission vacates the order (which could not be done lawfully without action under the Administrative Procedure Act).

It is also important that no credible evidence has been presented that U S WEST has acted anticompetitively in its integrated offerings of enhanced services. It would not be lawful to impose structural separation on U S WEST on account of any activity of another company, and the lack of evidence of anticompetitive activity by U S WEST is strong testimony that the FCC's nonstructural safeguards are working. Given the fury with which some of the commentators attack the integrated RBOC enhanced services, if U S WEST had any significant record of violations of the FCC's nonstructural safeguard rules, surely these parties would have brought evidence of such violations to the attention of the Commission.

Finally, U S WEST reviews a report submitted by Hatfield Associates. Hatfield opines that the networks of local exchange carriers have not yet been "fundamentally unbundled." From this observation, Hatfield concludes that cross subsidization could occur, and that many adverse costs would occur if RBOCs were to provide integrated enhanced services (none of which has actually occurred). We point out that Hatfield simply fails to address the real issue in this docket -- whether structural separation should be reimposed on the RBOCs.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Computer III Further Remand Proceedings:	)	
Bell Operating Company Provision of	)	CC Docket No. 95-20
Enhanced Services	)	

REPLY COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST"), through counsel, hereby files these Reply Comments in the above-captioned docket.

I. INTRODUCTION -- THE POSITION OF THOSE SEEKING REIMPOSITION OF STRUCTURAL SEPARATION IS UTTERLY EMPTY

In this proceeding, the Federal Communications Commission ("Commission" or "FCC") once more studies the issue of whether the divested Regional Bell Operating Companies ("RBOC")[1] should be required to offer what are called "enhanced services" through the device of a "fully separate subsidiary." For well more than a decade, it has been recognized by the Commission that imposition of a fully separate subsidiary requirement for enhanced services on any telecommunications company was counterproductive, uneconomic, anti-competitive

[1] In these Reply Comments we utilize the term "RBOCs" to refer to the seven holding companies formed upon the AT&T divestiture.

and profoundly contrary to the public interest. This proceeding is necessary because the United States Court of Appeals for the Ninth Circuit, in a series of decisions which frankly stand the Administrative Procedure Act on its head, was convinced by a group of petitioners led by MCI Telecommunications Corporation ("MCI") that the FCC had actually made an undefined concept called "fundamental unbundling" a critical part of open network architecture, and that failure to explain why such an undefined requirement should not be imposed on the divested RBOCs as a condition of eliminating structural separation for enhanced service offerings was arbitrary and capricious.[2] The most recent Ninth Circuit decision, predicated as it was on an incorrect premise, returned the issue to the FCC. However, the court decision simply required an explanation by the FCC, not a total relitigation of the entire separate subsidiary issue.

In our opening comments, U S WEST submitted significant evidence to the effect that structural separation caused serious harm to the public, and did little to actually prevent anti-competitive behavior. Indeed, in the one area where data is now available (because RBOCs were permitted to enter this market prior to other markets), voice messaging service, not only were consumers far better off because of the participation of RBOCs in the market on an integrated basis, but competitors were better off as well.[3] There is no good reason for depriving the public of the

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[2] See People of State of Cal. v. FCC, 39 F.3d 919, 922-25, 927-30 (9th Cir. 1994), cert. denied, 115 S. Ct. 1427 (1995).

[3] See Comments of U S WEST, Inc., filed herein Apr. 7, 1995, at 3-4, 11-13 (attached to the Erratum to Comments of U S WEST, Inc. filed herein Apr. 10, 1995).

wealth of services which integrated RBOC enhanced services can potentially provide -- particularly to the segments of the market which other enhanced service providers either cannot or will not serve (although there is no guaranty that any integrated RBOC enhanced service will actually succeed in the competitive marketplace). In fact, for a variety of reasons, reincarnation of the separate subsidiary requirement would constitute a serious legal error which would almost certainly result in court reversal. There is no evidence at all to support reimposition of structural separation.

It is not surprising that those whose private pecuniary interests would be served by depriving the public of the benefits of economic RBOC competition in the enhanced services market have again surfaced to argue that structural separation ought to be reimposed. It is surprising, however, just how devoid of meaningful factual evidence these parties' presentations are. While facts are sparse indeed in the comments seeking reimposition of structural separation, innuendo, speculation and flat-out silliness are rampant in these comments. In fact, so extreme and outlandish are the positions of some of these parties that their comments must be viewed for what they are -- blatant attempts to enlist the good offices of this Commission in a scheme to protect their private interests at the direct expense of the public interest which has been entrusted by statute to this Commission.

Several examples graphically illustrate our point.

CompuServe Incorporated ("CompuServe") asserts that "[a]mple evidence of RBOC discrimination exists."[4] At the federal level, however, CompuServe's "ample evidence" consists of "19 informal complaints [filed with the FCC]. . . classified either as Computer III or ONA-related -- since 1991."[5] However, CompuServe concedes that it was able to find copies of only six of these complaints, but concludes that "it is logical to assume that, based on the classification of the complaints as Computer III and ONA-related, at least some of the complaints may involve allegations that the RBOCs have discriminated against their enhanced service competitors."[6] CompuServe's position in the context of a legal system which provides a modicum of due process is bizarre. CompuServe claims that unidentified complaints by unidentified parties against unidentified defendants about unidentified activities constitute "ample evidence of discrimination" against U S WEST. One wonders what would constitute "scant evidence of discrimination" in CompuServe's legal rubric.

In an equally bizarre proposition, MCI, proclaiming that "monopoly is as monopoly does,"[7] actually takes the position that the RBOCs cannot be permitted to provide integrated enhanced services because, according to MCI, a Southwestern

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[4] Comments of CompuServe, filed herein Apr. 7, 1995, at 38.

[5] Id.

[6] Id.

[7] Comments of MCI, filed herein Apr. 10, 1995, at 38.

Bell employee was found guilty of bribery.[8] U S WEST has no knowledge of the incidents described in the MCI comments, and cannot comment on the accuracy of MCI's allegations (which appear to be based in large part on a newspaper article).[9] But bribery is a crime, and the notion that Southwestern Bell (or U S WEST) has some kind of proclivity towards criminal behavior would certainly require some truly serious evidence. Of more significance in the context of the instant docket, it is utterly impossible to discern just what relevance Southwestern Bell's asserted criminal tendencies have on the decision to reimpose structural separation on U S WEST, Southwestern Bell or any other RBOC. Is it MCI's contention that structural separation decreases the incidence of bribery? We submit that, in a nation of laws, the assumption must be made that companies such as U S WEST will obey the law. U S WEST's initial Comments demonstrated its commitment to compliance with the Commission's non-structural safeguard rules in significant detail.[10] Any rules based upon an assumption that U S WEST would deliberately violate the Commission's Rules would be totally unfounded and capricious.

Another introductory example also involves MCI. MCI describes its interest in this docket as motivated entirely by its desire to keep its long distance access rates reasonable and its interest in "ensuring equal, nondiscriminatory, reasonably priced access to fully unbundled basic network facilities for all enhanced service

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[8] See id. at 37.

[9] See id. at n.70.

[10] See U S WEST's Comments at 15-19.

providers (ESPs)."[11] What MCI does not even hint at in its filing is its intention to enter the local exchange market on a "massive scale" in direct competition with the RBOCs.[12] MCI's economic interest in providing local exchange services will be dramatically enhanced if it is successful in its current effort to disrupt the ability of the RBOCs to serve customers within areas where they provide exchange service. If MCI can really disrupt the RBOCs' provision of service in the manner described in its comments, its own ability to profit from such disruption by reaping a windfall for its own competitive exchange services operations will be enormous. Yet reading MCI's comments, one finds nary a hint of this huge economic incentive behind MCI's position in this docket. We do not suggest that MCI should be prohibited from using the Commission's processes for anti-competitive ends -- the Commission clearly has the ability to see through MCI's ruse -- but MCI's refusal to identify its clear interest in the proceeding must cause the rest of its comments to be viewed with skepticism.

In this context, it is important to keep in mind that structural separation as applied to related products impedes rational product development in the area of

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[11] MCI at 1.

[12] See, e.g., The Austin American-Statesman, Mar. 7, 1995, p. C1; The Atlanta Journal and Constitution, Mar. 7, 1995, p. E8; The Houston Chronicle, Mar. 6, 1995, Business Section, p. 1; The New York Times, Mar. 6, 1995, p. D1; Communications Week, Jan. 2, 1995, News Section, p. 49; Communications Week, Dec. 5, 1994, Network Services Section, p. 37. See also "MCI Rolls Out Plans for Local Network in Major Challenge to RHCs," Communications Daily, Jan. 5, 1994, at 1; "MCI Goes for 'Now' Wireless Technology for Nationwide Network," Communications Daily, Mar. 1, 1994, at 1 ("'We'll attack the RBOCs' local markets through our MCI Metro company.' MCI Metro is [a] $1.2-billion investment company that MCI announced earlier that's planned to bypass local exchange monopol[ies] held by RHCs.").

both basic and enhanced services. As U S WEST pointed out in its opening comments, structural separation along the enhanced/basic definitional line can be destructive of basic network development and modernization as well as economical provision of enhanced services.[13] Such an outcome would assist those who desire to provide their own local exchange service, but would be seriously disruptive to the public interest. One commentator who desires that structural separation be maintained is AT&T Corp. ("AT&T"), and AT&T recommends that structural separation be continued "[u]ntil the existing local exchange monopolies become competitive."[14] Of course, regulations which prevent local exchange carriers from upgrading their networks to provide modern and competitive services to their customers would undoubtedly hasten at least some configuration of competition, although not one which would serve any version of the public interest. And AT&T has conceded that structural separation has precisely this destructive effect on the ability of a carrier to improve its own basic network services. In AT&T's words, arguing why structural separation should not apply to its own services:

> Instead of encouraging technological innovation and upgrading of the AT&T Communications basic network, maximum separation has retarded the network's development and delayed -- if not prevented -- the introduction of new technologies of wide application. Future AT&T Communications services deploying new network technologies face either prohibition, or at best delay, regulatory uncertainty, and disclosure of valuable proprietary information. These factors increase costs and reduce the expected benefits from such services, and thus are

[13] See U S WEST Comments at 5-14.

[14] Comments of AT&T Corp., filed herein Apr. 7, 1995, at 2.

> powerful disincentives to network innovation. Ultimately, it is customers who must suffer from this reduced flow of services.[15]

AT&T stated it precisely right in 1984. Any competition brought about through structural separation would be false competition constructed to the detriment of consumers and the public interest. And we submit that any impartial observer would agree with the AT&T statement quoted above.[16]

The point of this introduction is to set forth briefly the basic point that the parties supporting reimposition of structural separation really have nothing meaningful to say. In the following sections we detail some of the more glaring errors and contradictions which appear in the comments seeking structural separation. But a point-by-point refutation does not seem like a meaningful exercise. Those supporting structural separation have a responsibility to come forward with some type of compelling evidence to document their position. Anecdotes, speculation or irrelevancies cannot be a viable substitute for a meaningful factual presentation.

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[15] Petition of American Telephone and Telegraph Company for Relief from Structural Separation Requirements, In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Docket No. 20828, filed Apr. 30, 1984 at 47.

[16] In fairness, AT&T never actually claims that structural separation will not harm or destroy the local exchange networks with which it will compete.

II. LEGAL ISSUES -- STRUCTURAL SEPARATION CANNOT BE LEGALLY REIMPOSED

Several legal issues are raised by the commentators favoring return to structural separation which merit brief comment.

First, several commentators make various proclamations to the effect that the burden of proof which the RBOCs, singularly or collectively, must fulfill to avoid reimposition of structural separation is so overwhelming that it can only be met with an extraordinarily compelling showing. This argument generally centers around the claim that the Ninth Circuit decisions have totally demolished the entire Computer III edifice, including all analysis, facts, evidence and experience coming out of the ten years of Computer III. MCI stated this proposition as follows:

> Because the structural relief granted in the Computer III Remand Order was entirely vacated, the proper starting point for the policy cost-benefit analysis in this proceeding is complete structural separation under the prior Computer II rules. If the Commission, by assuming that the starting point is structural integration under CEI plans, proceeds under such an elementary misapprehension of the current legal landscape, any structural relief granted at the conclusion of this docket is virtually certain to be reversed.[17]

The general premise of these comments is the argument that the RBOCs must prove that elimination of structural separation for their provision of enhanced services will be an overwhelming and unmitigated benefit to the public.

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[17] MCI Comments at 5-6. See also, e.g., Comments of Prodigy Services Company, filed herein Apr. 7, 1995, at 1, 5; CompuServe Comments at 12-15.

Actually, U S WEST, in its initial comments, made such a showing. However, the legal right of U S WEST to remain free from the irrational rigors of structural separation is well established, and the suggestion that the Commission could whimsically reimpose structural separation on the simple finding that it merely restores the status quo ante is quite wrong.

It must be remembered that the status quo permits integrated enhanced service operations by the RBOCs. Such is not only the case on account of the existing comparably efficient interconnection plans which the RBOCs have filed (many of which were approved long ago), but because the order actually granting structural relief remains in effect.[18] This Order, which was recently remanded to the Commission from the D.C. Circuit Court of Appeals,[19] remains in full force and effect, and any effort by the FCC to modify it to the detriment of the RBOCs would be subject to review for rationality under the Administrative Procedure Act. U S WEST has a vested legal right to conduct its business operations without the burden of uneconomic and wasteful regulations such as the separate subsidiary rules until and unless the Commission, following proper procedures and based on a solid record, determines to impose structural separation on U S WEST. Simply pointing to the Ninth Circuit's decision to the effect that the policies enunciated in

[18] See In the Matter of Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, Memorandum Opinion and Order, 9 FCC Rcd. 3053 (1994).

[19] See Order, No. 94-1597, MCI v. FCC (D.C. Cir. May 10, 1995).

the Computer III Remand Order[20] were not based upon a sufficient elaboration of how "fundamental unbundling" fit into the cost-benefit calculus would not be a sufficient basis on which to deprive U S WEST of this right. The adverse parties must demonstrate that there is a reason to reimpose structural separation on the RBOCs. They have really not even tried to do so on this record.

In fact, the adverse parties seriously understate the power of the Commission to modify a decision whose usefulness has long since passed. This is true even if our basic premise that U S WEST is entitled to structural relief as a matter of law is not accepted. The Commission is not required to "prove" that structural separation is anywhere near as bad a regulatory device as U S WEST's initial comments documents. In declining to impose structural separation on U S WEST (or in agreeing to free U S WEST from its structural separation rules, if one prefers that viewpoint) the Commission need only explain what it is doing and why. The suggestion that any decision which affects the ability of some, but not all, companies to compete must be cast in stone for all time, implicit in the analysis of the commentator favoring recognition of structural separation, is simply false.

It must also be remembered that Computer II structural separation for the RBOCs was never intended as more than an interim measure while the dust of divestiture settled. The Computer II structural separation rules were not designed

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[20] See In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order, 6 FCC Rcd. 7571 (1991); People of State of Cal. v. FCC, 39 F.3d at 927-30.

to fit anything smaller than the pre-divestiture AT&T,[21] and the FCC's decision to impose structural separation on the RBOCs was affirmed on appeal to a large extent on the basis that temporary emergency measures were appropriate in the immediate post-divestiture environment.[22] For the Commission to make these interim rules permanent would, at the very least, require a full record demonstrating that such rules were indeed lawful and appropriate. The mere fact that the rules were lawfully acceptable as interim rules does not permit the FCC to avoid the Administrative Procedure Act should it desire to make them permanent.[23]

Finally, the suggestion that the Commission must return to 1984 in its analysis ignores the fact that the "defect" in the FCC's analysis in the Computer III Remand Order was based on post-1984 events. Specifically, the Ninth Circuit reversed the Computer III Remand Order because of apparent inconsistency with some comments concerning "fundamental unbundling" (not the Commission's phrase) in the original Computer III Order.[24] The "fundamental unbundling" concept which troubled the Court appears nowhere else. Certainly the Computer II

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[21] See In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Memorandum Opinion and Order, 84 FCC 2d 50, 74 ¶ 70 (1980), Memorandum Opinion and Order on Further Reconsideration, 88 FCC 2d 512, 541 ¶ 84 (1981).

[22] See Computer and Communications, Etc. v. FCC, 693 F.2d 198, 218-20 (D.C. Cir. 1982).

[23] See In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC 2d 384, 388-89 ¶ 12, 470 ¶ 224 (1980), Memorandum Opinion and Order, 84 FCC 2d at 71-72 ¶ 63.

[24] See In the Matter of Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 FCC 2d 958 (1986); People of State of Cal. v. FCC, 39 F.3d at 927-30.

and CC Docket No. 83-115 Orders imposing structural separation never hinted that "fundamental unbundling" might be a precondition for elimination of such a requirement.[25] If, as MCI suggests, the proceeding must (or can) be thrown back to the old Computer II era, MCI loses the argument which brought it success at the Court, because there would be no hint of "fundamental unbundling" to which even MCI could refer.

U S WEST is quite comfortable that the case for integration is so overwhelming that the Commission must permit continuation of integrated operations no matter what the operable standard to be applied in this proceeding. However, the standards set forth by MCI, etc., which would make it virtually impossible for the FCC to eliminate a wasteful and harmful rule applicable to only a select group of industry players and adopted on an interim basis, are clearly administrative standards which the Commission must avoid, in this proceeding as well as all others.

Second, all commentators seeking reimposition of structural separation treat all seven RBOCs as a class, imputing the alleged misconduct of one to all of them. For example, a prime reason cited by many commentators as to why U S WEST should be subject to structural separation is the alleged misconduct of BellSouth in

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[25] See Computer II, Final Decision, 77 FCC 2d 384, Memorandum Opinion and Order, 84 FCC 2d 50, Memorandum Opinion and Order on Further Reconsideration, 88 FCC 2d 512; In the Matter of Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, Report and Order, 95 FCC 2d 1117 (1983), aff'd sub nom. Illinois Bell Telephone Co. v. FCC, 740 F.2d 465 (7th Cir. 1984), modified on recon., Bell Operating Companies Structural Separations, 56 Rad. Reg. (P&F) 2d 581 (1984), aff'd sub nom. North American Telecommunications Ass'n v. FCC, 772 F.2d 1282 (7th Cir. 1985).

the MemoryCall matter.[26] U S WEST was not a party to the MemoryCall proceeding before the Georgia Public Service Commission, and frankly had no standing to become a party. Thus, as to the facts of the matter, U S WEST will not attempt to speak for BellSouth. However, even if BellSouth's conduct in MemoryCall were found to be truly anti-competitive and evil, such a conclusion would form no basis on which to reimpose structural separation on U S WEST.

Section 64.702(c) does not impose structural separation on any specific class of carrier, but rather permits the Commission to do so on a selective basis -- analogized as an exercise in prosecutorial discretion by the Seventh Circuit Court of Appeals.[27] There are eight large local exchange carriers with similar economics, structure and incentives -- GTE and the seven BOCs. The Commission shows no desire to treat all of these carriers in the same fashion -- GTE was only made subject to open network architecture a year ago and has never been subject to Computer II structural separation.[28] Thus the Commission has made it very clear that it has not carved out a class of carriers whose characteristics are so nearly identical that they may be treated identically as a matter of law with no further analysis. There is similarly no basis on which the actions of BellSouth could lawfully be imputed to U S WEST. Before the Commission could lawfully reimpose

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[26] See, e.g., CompuServe Comments at 38-40; MCI Comments at 9, 27-29.

[27] See Illinois Bell Telephone Co. v. FCC, 740 F.2d at 475-76.

[28] See In the Matter of Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, Report and Order, 9 FCC Rcd. 4922 (1994).

structural separation on U S WEST, it would need to make factual record relating to U S WEST. That record could not be based on activity of BellSouth. If the Commission were to actually desire to treat all similarly situated local exchange carriers as a unified class in determining whether or not to reimpose structural separation, it would need to include GTE in that class. Having chosen to rely on individual treatment of exchange carriers (which U S WEST agrees is the fairest and most rational way in which to proceed), the Commission may not lawfully impute conduct of an unrelated exchange carrier to U S WEST.

Finally, MCI repeatedly argues that structural separation must be reimposed because only in a structural separation environment can the FCC's preemptive jurisdiction be properly preserved.[29] MCI's theory is simple: as enhanced services are national in scope, and the FCC's preemptive jurisdiction over structural separation matters has been upheld by a court, while the FCC's non-structural safeguard preemptive power has been curtailed,[30] only structural separation can possibly recognize the national purposes which the FCC must fulfill in the enhanced services arena.[31] In other words, MCI is arguing that the only way in which the FCC can evade the jurisdictional allocation confirmed by the Ninth Circuit in the first Computer III reversal[32] is to return to the Computer II structural separation

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[29] See MCI Comments at 24-27.

[30] Id.

[31] Id.

model (with its apparently broader preemption). U S WEST has often found itself arguing that the FCC's preemptive jurisdiction is, or ought to be, fairly broad, and we agree that many aspects of the enhanced services market are national in scope. However, for better or worse, the jurisdictional structure established in the Communications Act is based on the assumption that states can properly regulate within their spheres of authority. MCI is in fact arguing for continuance of an uneconomical and wasteful regulatory scheme as a device to expand the power of this Commission over the states. Such a ruse ought not to be tolerated by any representatives of the federal government.

III. NO CREDIBLE EVIDENCE OF U S WEST DISCRIMINATION UNDER ONA HAS BEEN PRESENTED

In our initial comments, U S WEST described at length its extensive efforts to comply punctiliously with the non-structural safeguards established by the Commission as part of relief from the structural separation rules.[33] Despite the years of experience under the non-structural safeguard regulatory regime, and almost a million U S WEST enhanced service customers, the opposing parties are unable to submit any credible (or remotely credible) evidence that U S WEST has in any way traduced the FCC's non-structural safeguard rules. Indeed, even if the factual allegations of the adverse parties were true, they would not provide evidence of any meaningful transgression by U S WEST. A brief review of what has been said about U S WEST's compliance efforts is instructive and typical.

[33] See U S WEST Comments at 15-19.